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In the Supreme Court of the United States

October Term, 1982

FIRST CATHOLIC SLOVAK LADIES ASSOCIATION,
Petitioner,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Whether eligibility for election to a position of director/officer of a fraternal benefit association constitutes an employment opportunity within the purview of the Age Discrimination in Employment Act.

2. Whether the performance of "traditional employee duties" by a director/officer of a fraternal benefit association renders the director/officer an "employee" for purposes of the Age Discrimination in Employment Act.

LIST OF ALL PARTIES TO PROCEEDING

The following are all the parties to the proceeding in the United States Court of Appeals for the Sixth Circuit whose judgment here is sought to be reviewed:

Equal Employment Opportunity Commission; and

First Catholic Slovak Ladies Association.

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No.

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FIRST CATHOLIC SLOVAK LADIES ASSOCIATION,
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vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is officially reported as *EEOC v. First Catholic Slovak Ladies Association,* 694 F.2d 1068 (6th Cir. 1982) and is reproduced as Appendix A at pages A1 through A6. The opinion of the United States District Court for the Northern District of Ohio, Eastern Division, filed in this matter on July 6, 1981, is unreported and is reproduced as Appendix B at pages A7 through A18.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was filed on December 10, 1982 (Appendix C, pages A19 through A20). A timely petition for rehearing *en banc* filed on behalf of The First Catholic Slovak Ladies Association was denied on February 23, 1983 (Appendix D, page A21). This petition for certiorari was filed within 90 days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Sections 4 and 11 of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§623, 630, provide in pertinent part:

> Prohibition of Age Discrimination
>
> *Employer Practices*
>
> (a) It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; . . .

29 U.S.C. §623(a)(1),(2).

Definitions

For the purposes of this chapter—

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. . . .

. . . .

(f) The term "employee" means an individual employed by any employer. . . .

29 U.S.C. §630(a),(b),(f).

Section 2 of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621, also is involved in this petition (Appendix E, A22).

STATEMENT OF THE CASE

A. The Parties.

Respondent Equal Employment Opportunity Commission ("EEOC") commenced this action in response to complaints filed by Frances Mizenko and Anna Hook, former director/officers of Petitioner First Catholic Slovak Ladies Association (the "Association"), which alleged violations of the Age Discrimination in Employment Act of 1967 ("ADEA"), as amended, 29 U.S.C. §§621 *et seq.* Jurisdic-

tion in the district court was predicated upon 28 U.S.C. §§451 and 1345.

The Association is a fraternal benefit association duly organized and licensed under the laws of the State of Ohio. As a fraternal benefit association, the Association is a not-for-profit corporation organized without capital stock under a lodge system with a representative form of government; exists for the benefit of its members and their beneficiaries; and sells insurance to its members only, on a non-profit basis, in accordance with the terms of certificates purchased by them. The purposes of the Association, in addition to the insurance of its members, are to promote the temporal and spiritual welfare of its members, aid and console widows, widowers and orphans, adhere to and be strengthened by the Catholic faith, cultivate and preserve the Slovak language and heritage, assist young members in financing a college education, and maintain a home for the aged. Membership in the Association is limited to Catholic individuals of Slovak birth or descent and their families who are elected to membership by current members of a local Branch upon purchase of an initial certificate of insurance.

B. Organization and Government of the Association.

Association membership is divided into Junior and Senior Orders, based upon the age of the members, with those Orders further subdivided by geographic region into local Branches. Branches with at least fifty members elect and send a delegate to the National Convention. The Convention, composed of elected delegates, the Board of Directors, and Members of the Court of Appeals, is the supreme governing body of the Association and meets every four years.

Association affairs are administered in the interim between Conventions by the Board of Directors, the Association's fourteen director/officers who are elected at the Convention to four year terms by vote of all members of the Convention. The Board of Directors is composed of the President, three Vice-Presidents, the Secretary, the Secretary of the Junior Order, the Treasurer, the Trustees, three Auditors, the Chaplain, and the Editor. Any delegate to the Convention who is 66 years of age or under on the first day of the term for which the elections are to be held is eligible for nomination, election, or appointment to the Association's Board of Directors.

The duties of the Board of Directors are to meet at least twice annually, administer all affairs of the Association between Conventions, establish general policies, and meet in any special session necessary for the operation of the Association. The Board also hears complaints lodged against any member or Branch and has the authority to remove any director/officer for misconduct, incompetence, dishonesty or other good cause. Seven members of the Board of Directors comprise the Board's Executive Committee and are responsible for administering the day to day affairs of the Association in accordance with the general policy guidelines set by the entire Board. These responsibilities include the performance of those banking, accounting, and investment duties which are necessary to the operation of the fraternal insurance program of the Association. The members of the Executive Committee are the President, the Secretary, the Secretary of the Junior Order, the Treasurer, the Chaplain, and the Trustees. All the members of the Board of Directors receive compensation for the performance of their duties.

C. Frances Mizenko and Anna Hook.

Frances Mizenko and Anna Hook both served as elected directors/officers of the Association during the 1976-1980 term (as National Secretary and National Secretary Junior Order respectively) and performed administrative and managerial duties as specified in the Association's Constitution and Bylaws. When their terms as members of the Board of Directors and officers ended, both Ms. Hook and Ms. Mizenko retired. Because they were both over the age of 66, they were ineligible for nomination for election to another term as director/officers under the Association's Constitution and Bylaws. Accordingly, they were not considered for renomination.

D. EEOC Action.

Ms. Mizenko and Ms. Hook filed age discrimination charges with the EEOC which could not be resolved through reconciliation.

The EEOC then commenced suit in the district court on behalf of Ms. Mizenko and Ms. Hook and advanced three contentions. First, it correctly noted that Article XII §1(f) of the Association's Constitution and Bylaws provides:

> Any delegate of the Association who is 66 years or under on the first day of the new term is eligible for nomination, election, or appointment to the Board of Directors.

Second, it properly observed that Article X(a) of the Constitution and Bylaws states:

> The members of the Board of Directors shall be elected officers defined in Article XII, Officers, Section 1 in General, subparagraph (a).

The EEOC asserted, however, that the Association's Constitution and Bylaws violates section 4 of the ADEA, 29 U.S.C. §623(a) because the foregoing provisions preclude members who will be between the ages of 66 and one day and 70 years of age at the onset of the new term from standing for election as Association director/officers.

E. Decisions by the Courts Below.

The district court granted the Association's motion for summary judgment and held that it lacked subject matter jurisdiction because the Association director/officers are not "employees" within the provisions of the ADEA. The trial court premised its decision upon its interpretation of the ADEA and legislative intent, including its findings that Congress did not intend that a person in an elected executive position of short duration be deemed a "worker" in need of the protection of the ADEA, that obtaining a position by an election process is not a "hiring", that the expiration of a term of office is not a "discharge", and that analogy to Title VII demonstrates that election to a board of directors clearly is not covered by the provisions of the ADEA.

The court of appeals reversed. It rejected the district court's analysis and stated:

> By emphasizing that these women held elected positions as directors and officers, the District Court failed to assess accurately their true status. *These individuals performed traditional employee duties*: maintaining records, preparing financial statements, managing the office. They were responsible for their work to the governing body of the organization and they drew salaries as employees. *Their participation on the policy-making Board of Directors does not detract from their primary role as employees.*

> . . . The women in this case have been denied the opportunity to apply for the job of Secretary and Secretary of the Junior Order simply because of a provision in the Association's by-laws which limits these employment opportunities through an age restriction. These positions of officers of the FCSLA come within the broad definition of "employee" as we interpret the term in the Age Discrimination in Employment Act. Thus, the District Court erred by holding that it lacked subject matter jurisdiction under the ADEA.
>
> *EEOC v. First Catholic Slovak Ladies Ass'n*, 694 F.2d 1068, 1070 (6th Cir. 1982) (emphasis supplied).

ARGUMENT

A. Preliminary.

Whether the Age Discrimination in Employment Act governs the eligibility for election of director/officers of a fraternal benefit association presents an important issue of federal law which never has been, but should be, reviewed by this Court.

First, the decision by the court of appeals conflicts with expressed congressional intent underlying parallel federal social welfare legislation and evidences a misapprehension of the relationship between the corporate entity and its duly elected executive management personnel. The decision also conflicts with that of the United States Court of Appeals for the Eleventh Circuit in *Hishon v. King & Spalding*, 678 F.2d 1022 (11th Cir. 1982), *cert. granted*, 51 U.S.L.W. 3552 (1982) (No. 82-940), an analogous decision under Title VII of the Civil Rights Act of 1964.

Second, the decision creates an erroneous test governing application of the ADEA, unsupported by statute, legis-

lative history, or case law, which invites extension of the provisions of the ADEA, Title VII, as well as other federal social welfare legislation, to any and all corporate directors who may be said to perform any "traditional employee duties".

B. Congress Did Not Intend to Include Elected Corporate Directors As Employees Within the Protection of the ADEA.

Congress' articulated legislative purpose in enacting the ADEA was to protect the ability of older wage-earners to obtain and retain employment in the marketplace on an equal footing with younger workers. In the preamble to the Act, Congress stated:

> (a) The Congress hereby finds and declares that—
>
> (1) in the face of rising productivity and affluence, *older workers find themselves disadvantaged in their efforts to retain employment,* and especially to regain employment when displaced from jobs;
>
> . . . .
>
> (3) the incidence of *unemployment,* especially long-term unemployment . . . *is* . . . *high among older workers.* . . .
>
> 29 U.S.C. §621(a)(1), (3) (emphasis supplied).

Congress therefore designated a class of persons ("employees" 29 U.S.C. §630(f)) to be protected by the ADEA composed of those persons in the labor force between the ages of 40 and 70 available for hire or hired by an employer for the performance of specified duties. 29 U.S.C. §631(a).

The fundamental question raised in the district court in these proceedings was whether Congress intended to

include elected corporate directors as "employees" within the scope of the ADEA or other social welfare legislation. The legislative history of the ADEA is not directly helpful. Nonetheless, this Court, as well as lower federal courts, has recognized the propriety of examining the law arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e-2000e-17, for guidance in the interpretation of the ADEA. *E.g., Lorillard v. Pons,* 434 U.S. 575, 584 (1978); *Laugesen v. Anaconda Co.,* 510 F.2d 307, 311 (6th Cir. 1975). The legislative history of Title VII, therefore, is both relevant and authoritative wherein it provides:

> Mr. Clark. Mr. President, during the course of this debate, a number of objections have been raised to various provisions of Title VII. I believe, rather than to deal with them seriatim, and to an empty Chamber, it would be wiser to have them printed in the Record, where they can be perused at leisure by Senators—there may be one or two who still read this debate in the Congressional Record. Accordingly, I ask unanimous consent that a series of objections which have been raised by opponents of the bill, either on or off the floor, to Title VII, and the answers to these objections may be printed in full in the Record at this point in my remarks.
>
> There being no objection, the statement was ordered to be printed in the Record, as follows:
>
> . . . .
>
> Objection: It is arguable that the bill apply to the election of the Board of Directors by Stockholders.
>
> Answer: It will not. *Board members are not employees nor are stockholders employers.*
>
> 110 Cong. Rec. 7217-18 (April 8, 1964) (emphasis supplied).

Because the definition of "employee" in Title VII and the ADEA is identical, the foregoing legislative history is directly applicable to the facts here at issue and should have precluded the appellate court's finding. The Association's director/officers, like their corporate counterparts, are elected by Association members (shareholders) as their representatives and agents to establish and administer Association (corporation) policies and affairs. As the district court properly noted, that democratic election process is not an act of hiring and creates no employment relationship.

Unlike for-profit corporations, however, the Association does not elect a board of directors which then elects or appoints the officers of the corporation to manage its day to day affairs. The Convention elects, from its membership, those persons who are to direct the Association both by providing general guidance (Board of Directors) and by administering its daily affairs (Board's Executive Committee). There is no distinction or difference among the directors except as to the nature of the duties they will perform in the governance of the Association. The directors do not stand for election as directors and then again as officers; they stand for election to a specific position on the Board of Directors, whether that position be President, Secretary, Auditor, Chaplain, or one of the other positions. The positions of director and officer are intertwined and inextricable. As elected representatives of the Association members, therefore, the director/officers cannot be deemed "employees" for purposes of the ADEA.

The United States Court of Appeals for the Eleventh Circuit similarly has construed the definition of "employee" for purposes of Title VII. In *Hishon v. King & Spalding,* 678 F.2d 1022 (11th Cir. 1982), *cert. granted,* 51 U.S.L.W. 3552 (1982) (No. 82-940), a case analogous to that here

presented, the plaintiff alleged sex discrimination as the basis for denial of election to partnership within the defendant law firm. The court of appeals affirmed the district court's dismissal of the case for lack of subject matter jurisdiction which the latter premised on two findings: 1) a partner was held not to be an employee within the purview of the Civil Rights Act of 1964; and 2) election to partnership as distinguished from a promotion, was not covered by the provisions of the Act. The district court distinguished partners from employees on the basis of a partner's ability to manage and control the business enterprise. *Accord, Burke v. Friedman,* 556 F.2d 867, 869 (7th Cir. 1977).

The district court also analogized the election to partnership to the election of the Board of Directors of a corporation. It emphasized the fact that the partners were elected, not promoted, and stated:

> A promising young lawyer who is elected to partnership is comparable to a promising young engineer working for the Chevrolet Division of General Motors who is elected to the board of directors of that corporation. This comparison, if apt, goes far toward resolving this case; this for the reason that the legislative history of Title VII clearly shows that the Chapter was not intended to apply to the election of corporate directors.
>
> *Hishon v. King & Spalding,* 24 FEP Cases 1303, 1306 (N.D. Ga. 1980).

The position of a director/officer within the Association is comparable to that of a partner in a partnership or a director of a corporation. Each is elected, not promoted, to his position. Each manages and controls the entity's business and is responsible for the articulation and

administration of its general policies. In light of the legislative history of Title VII discussed above, therefore, it is clear that Congress never intended to include within the protective scope of Title VII or the ADEA persons democratically elected to such policy-making, executive positions. Should the decision by the court of appeals herein be permitted to stand, however, this congressional intent limiting application of Title VII and the ADEA will be undermined.

C. The Relationship Between Parties Controls Determination of Employee Status.

Rather than ascertain and adhere to the congressional intent underlying the scope of the ADEA, the court of appeals articulated and applied an erroneous test to determine the reach of the Act. The lower court focused on certain of the ministerial tasks performed by Ms. Mizenko and Ms. Hook, declared such to be "traditional employee duties", and concluded that their performance of these tasks established their primary role as employees. 694 F.2d at 1070. The court accordingly held that, notwithstanding their status as elected managerial executives democratically selected by the Association members, both women were employees for purposes of the ADEA. In so finding, the lower court clearly misapprehended the intended scope of the ADEA.

No provision of the ADEA categorizes those protected by the Act with reference to the type of duties performed, traditional or otherwise. Section 11 of the Act simply provides that "[t]he term 'employee' means an individual employed by any employer". 29 U.S.C. §630(f). This direct definition of those who may enjoy ADEA protection clearly is premised upon a finding of an employment relationship. Applicability *vel non* of the Act to a partic-

ular factual setting, therefore, requires a scrutiny of the relationship between the person and entity in question to determine whether an employment relationship exists, a scrutiny the court of appeals neglected to make. *Zimmerman v. North American Signal Co.*, 31 FEP Cases 634, 637 & n.4 (7th Cir. 1983); *Hickey v. Arkla Industries*, 31 FEP Cases 238, 240-41 (5th Cir. 1983). *See Hishon v. King & Spalding*, 678 F.2d 1022, 1028 (11th Cir. 1982).

Judge Krupansky (now Circuit Judge) of the district court below cogently explained that an employment relationship is characterized by an act of hire by which a worker acquires a position normally for an unlimited duration with an expectancy of continued employment hopefully accompanied by periodic promotions. That relationship may be terminated by the employer by an act of discharge. Employees also merely execute policies formulated by the employer (by the board of directors in a corporate setting) and remain responsible to and under the supervision and control of the employer (board of directors). These fundamental traits, evident in the relationship between the Association and its employees, are absent from the relationship between the Association and its director/officers.

Employees of the Association, such as its clerical and maintenance personnel, fit precisely the mold described by the district court. They are hired by the Association for an unlimited duration to perform specific functions. Such employees have a reasonable expectancy of continued employment accompanied by periodic promotions. They remain under the supervision and control of the director/officers and may be discharged at will. Despite the foregoing, none of the Association's employees can be said to regard a position as a director/officer as an employment opportunity to which he/she may someday be promoted.

In fact, many if not all of these employees are precluded from attaining a director/officer position because they are not eligible for Association membership. Unlike the claimant in *Hishon,* therefore, no Association employee can be said to regard the positions as director/officers as promotional opportunities.

By contrast, director/officers are elected by Association members, through a democratic, electoral process, as representatives to articulate and administer Association policies and goals on the latter's behalf. The members engage in no act of hire. The members engage in no act of promotion. They merely elect representatives as shareholders elect a board of directors.

The director/officers assume their positions as members' representatives for a fixed, limited duration with no expectation of a continuous tenure in such capacities. The director/officers establish Association policy and constitute the ultimate authority in the administration of Association affairs. They are subject to removal only for violation of the Association Constitution and Bylaws and answer only to the Association's Convention as a corporation's board of directors answers to a meeting of shareholders. The duties performed by each director/officer are in no way determinative of the person's status with the Association. Corporate directors and partners customarily perform duties for remuneration under circumstances which, under the Sixth Circuit's rule, could be construed as the performance of "traditional employee duties". The performance of such duties in no way alters the nature of the relationship between them and the entity of which they are a part. Because the essence of the relationship between the Association and its director/officers is not an employment relationship but that of individuals and their representative governing body se-

lected through a bona fide electoral process, the Association's director/officers cannot be deemed employees within the scope of the ADEA.

The court of appeals in *Hishon v. King & Spalding, supra,* similarly disposed of certain of that claimant's contentions in finding that a partner in a law firm is not an employee of the partnership for purposes of Title VII. In reaching its finding, the *Hishon* court focused not on the duties performed by a partner but on the essence of the relationship between the parties and the partnership:

> The partnership is the appellant's employer; the partners own the partnership; they are not its "employees" under Title VII.
>
> We find a clear distinction between employees of a corporation and partners of a law firm. In making this distinction, we do not presume to exalt form over substance. In this instance, however, the form *is* the substance, and we are unwilling to dictate partnership decisions under the guise of employee promotions protected by Title VII. The very essence of a partnership is the voluntary joinder of all partners with each other.
>
> 678 F.2d at 1028 (emphasis in original).

Because the nature of the relationship between a partner elected to partnership and the partnership itself, therefore, is not an employment relationship, the Eleventh Circuit rejected the contention that partners are employees for purposes of Title VII.

The court of appeals herein, however, ignored the essence of the relationship between the Association and its director/officers. By focusing instead on whether the

latter performed any "traditional employee duties", however that may come to be defined, the Sixth Circuit effected what the district court so aptly labeled "an improvident judicial expansion of the intended scope of protection of the ADEA." By its unprecedented inquiry, the court of appeals has laid the groundwork for extension of the scope of the ADEA to include all corporate directors involved in the day to day affairs of a corporation, a result contrary to the clearly articulated congressional intent.

CONCLUSION

There is neither logic nor precedent for extending the coverage of the ADEA to the eligibility for election to a position of director/officer of a fraternal benefit association in the absence of a clear statutory or legislative requirement that it should be so extended. A writ of certiorari, therefore, should be granted to review and ultimately reverse the decision below.

Respectfully submitted,

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APPENDIX A

Opinion of the Court of Appeals for the Sixth Circuit

(Filed December 10, 1982)

No. 81-3534

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,

v.

THE FIRST CATHOLIC SLOVAK LADIES ASSOCIATION,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Northern District of Ohio.

Before: ENGEL and MERRITT, *Circuit Judges;* MORTON, *Chief District Judge.**

MERRITT, *Circuit Judge.* This is an appeal by the Equal Employment Opportunity Commission (EEOC) of the District Court's summary judgment order dismissing the case for lack of subject matter jurisdiction. The EEOC alleges that the First Catholic Slovak Ladies Association (the Association or FCSLA) has violated the Age Dis-

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*The Honorable L. Clure Morton, Chief District Judge, United States District Court for the Middle District of Tennessee, sitting by designation.

crimination in Employment Act (ADEA), 29 U.S.C. §621, *et seq.* The EEOC sues on behalf of two former officers of the Association who are between the ages of 66 and 70 years old. The FCSLA is a benevolent association whose members must be either Catholic and of Slovak descent or married to a Catholic of Slovak descent. A non-profit society, the FCSLA sells insurance to its members, maintains various charitable institutions for the elderly and supports educational and religious opportunities.

The FCSLA is governed by three distinct bodies: the Convention, the Board of Directors and the Court of Appeals. The Convention is composed of elected delegates from the many branches around the country. The Convention meets every four years to elect the fourteen members of the Board of Directors who serve until the next election. The Board meets twice yearly to make policy decisions for the Association and to hear complaints by and against members. The Court of Appeals entertains complaints arising out of decisions of the Board.

Each of the directors on the Board also serves as an officer of the Association in some specific capacity such as Secretary, Chaplain or Auditor. The daily management of the Association is the responsibility of seven of these officers who serve on the Executive Committee: the President, Chaplain, Secretary, Secretary of the Junior Order, Treasurer and two Trustees. Each of these officers receives a salary commensurate with the extent of her other duties. The Secretary and the Secretary of the Junior Order, the individuals represented by the EEOC in this action, received $25,000 and $15,000 per year, respectively. Their duties included managing the Association's offices, maintaining the records, collecting Association funds and publishing reports.

The EEOC complaint centers on the following provision of the Association's by-laws:

> Any delegate of the Association who is 66 years or under on the first day of the new term is eligible for nomination, election, or appointment to the Board of Directors.

(App. at 176.) The problem is not, however, that the Directors must be 66 years old or younger. Rather, the difficulty arises because this provision indirectly requires that officers also meet the age limitation since all officers must also be on the Board of Directors. (By-laws Article X(a), App. at 174.) The EEOC challenges this age restriction as being in violation of the following statutory provisions on age discrimination:

> (a) It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, condtions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.

29 U.S.C. §623(a). The ADEA prohibition on age discrimination applies to employees under the age of 70. 20 U.S.C. §631(a). An employee is defined in the Act simply as "An individual employed by an employer," and an employer is defined as "a person engaged in an industry affecting commerce." 29 U.S.C. §§630(f) and (b). Since these definitions leave great room for interpretation, the

issue in this case becomes that of determining whether the salaried officers of the FCSLA should be considered to be employees under the ADEA.

The District Court below found that the directors and therefore the officers of the FCSLA were not employees protected by the ADEA primarily because they assumed office by an elective process and because directorships have traditionally been viewed as employer rather than employee positions. The court below found persuasive by analogy the Eleventh Circuit decision in *Hishon v. King & Spalding*, 678 F.2d 1022 (1982). In that case the Title VII prohibitions on sex discrimination were held not to apply to a law firm partnership decision not to elevate a female attorney to the position of partner. The District Court in the case at hand emphasized that an election to the Board of the FCSLA, like an election to the partnership of a law firm, involves an internal decision on who should govern and set broad policies for the organization.

We reverse the decision of the District Court because we believe the court interpreted the term "employee" too narrowly and failed to assess the true nature of the position of officer of the Association.

The purpose of the ADEA as stated in the Act itself is to "prohibit arbitrary age discrimination" and "to promote the employment of older persons based on their ability and not their age." 29 U.S.C. §621(b), Statement of Findings and Purpose. When interpreting the term "employee" in social welfare legislation such as the ADEA, Title VII, the Fair Labor Standards Act and the National Labor Relations Act, courts have used a broad definition so as to effectuate the stated purposes of these Acts. *See, e.g., Cincinnati Ass'n for the Blind v. N.L.R.B.*, 672

F.2d 567 (6th Cir. 1982) (NLRA); *Dunlop v. Carriage Carpet Co.*, 548 F.2d 139 (6th Cir. 1977) (FLSA).

A determination of whether an individual is an employee and therefore covered by the protections in ADEA should not center on the label which the organization has chosen to give to the position. By emphasizing that these women held elected positions as directors and officers, the District Court failed to assess accurately their true status. These individuals performed traditional employee duties: maintaining records, preparing financial statements, managing the office. They were responsible for their work to the governing body of the organization and they drew salaries as employees. Their participation on the policy-making Board of Directors does not detract from their primary role as employees.

Nor does the Court find the analogy to the *Hishon* case, *supra,* to be controlling in this instance. In *Hishon,* the Eleventh Circuit emphasized that its holding concerned a decision by the partners on whether to admit a new partner to the partnership:

> . . . we are unwilling to dictate partnership decisions under the guise of employee promotions protected by Title VII. The very essence of a partnership is the voluntary joinder of all partners with each other.

Id. at 1028. Although we reserve judgment as to the holding in *Hishon,* we find the case to be easily distinguishable. The election to partnership with its corresponding opportunity to share in the partnership profits differs markedly from the "election" to the position of officer in the FCSLA. The women in this case have been denied the opportunity to apply for the job of Secretary and Secretary of the Junior Order simply because of a provision in the Association's by-laws which limits these

employment opportunities through an age restriction. These positions of officers of the FCSLA come within the broad definition of "employee" as we interpret the term in the Age Discrimination in Employment Act. Thus, the District Court erred by holding that it lacked subject matter jurisdiction under the ADEA.

For these reasons, we reverse the District Court order dismissing the case on summary judgment and remand for proceedings consistent with this opinion.

APPENDIX B

Memorandum and Order of the United States District Court

(Filed July 6, 1981)

Civil Action No. C80-1677

THE UNITED STATES DISTRICT COURT
THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,

v.

FIRST CATHOLIC SLOVAK LADIES ASSOCIATION,
Defendant.

KRUPANSKY, *J.*

MEMORANDUM AND ORDER

This is an action by plaintiff Equal Employment Opportunity Commission (EEOC) against Ohio corporation defendant First Catholic Slovak Ladies Association (Association) for damages and injunctive relief arising from purported unlawful employment practices by defendant in violation of the Age Discrimination in Employment Act of 1967, as amended (ADEA), 29 U.S.C. §621, *et seq.* which incorporates by reference the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §201 *et seq.* EEOC contends that defendant Association prohibits the employ-

ment of officers who are over the age of 66 by limiting from nomination, election, appointment, or re-election to the Board of Directors any person over the age of 66 which constitutes a precondition to employment of any individual as an officer in violation of 29 U.S.C. §623(a)(1) and (2). Jurisdiction is predicated upon 28 U.S.C. §§451 and 1345.

Before the Court is defendant Association's Motion for Summary Judgment pursuant to Rule 56, Fed. R. Civ. P. The filings reveal the following uncontroverted facts. The Association, a not-for-profit corporation chartered within the State of Ohio, is a fraternal organization the objective of which is to promote the temporal and spiritual welfare of its members, render more tolerable the conditions of widows, widowers and orphans, adhere to and be strengthened in the holy Catholic faith, cultivate the Slovak language, accumulate and maintain funds for the payment of benefits to members and beneficiaries, aid and assist in the financing of college educational expenses, and maintain a Home for the Aged (By-Laws, Article II §a-f). Membership is limited to individuals of Slovak birth or descent who are also Catholic and families thereof (By-Laws, Article VI §1a-b). An individual may become a member of the Association only upon being elected thereto by the existing members of the local Branch (By-Laws, Article VI §2).

The highest legislative power of the Association consists of the Convention which meets regularly at four year intervals (By-Laws, Article IX §2(a) and §3(a)). The Convention consists of three components, discussed *seriatim* hereafter: the Board of Directors, the members of the Court of Appeals, and the delegates of the Branches (By-Laws, Article IX §1(a)).

The Board of Directors consists of fourteen members which meet at least twice a year for the purpose of managing the affairs of the Association (By-Laws, Article X(b)). In particular, the Board hears all complaints pertaining to the affairs of the Association between Branches, or against members, officers of local Branches, officers and individuals (By-Laws, Article X(c)). These fourteen individuals who collectively serve as the Board of Directors also serve as the Officers of the Association, to wit, the Chaplain, President, three Vice-Presidents, Secretary, Secretary of the Junior Order, Treasurer, two Trustees, three Auditors, and an Editor (By-Laws, Article XII §1(a) and Article X(a)). Further, the Chaplain, President, Secretary, Secretary of the Junior Order, Treasurer and two Trustees also serve as members of the Executive Committee which is charged with managing the affairs of the Association between meetings of the Board (By-Laws, Article XI(1)).

The Court of Appeals consists of 12 individuals elected by The Convention and is charged with the duty of hearing and rendering decisions on all appeals resulting from the decisions of the Board of Directors (By-Laws, Article XIV §1).

The delegates of the Branches are elected by their respective Branches to serve on The Convention and each represents approximately one hundred members (By-Laws, Article X §1(b)). These delegates control not less than two-thirds of the voting power of any Convention. (By-Laws, Article IX §1(a)).

EEOC has initiated the instant litigation on behalf of Frances L. Mizenko (Mizenko) and Anna A. Hook (Hook) who maintained the respective elected offices of Secretary and Secretary of the Junior Order of the Association's Board of Directors (Plaintiff's First Set of Inter-

rogatories to Defendant No. 15). These individuals have allegedly been adversely and unlawfully discriminated against by defendant Association through implementation of the practices contained in Article XII §1(e) which provides:

> Any delegate of the Association who is 66 years or under on the first day of the new term is eligible for nomination, election, or appointment to the Board of Directors.

EEOC maintains that Article XII §1(e) violates 29 U.S.C. §623(a) which states:

> (a) It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.

This statutory prohibition is applicable to individuals less than 70 years of age. 29 U.S.C. §631(a).

It is initially noted that the fourteen members of the Board of Directors possess no greater than 1/3 of the voting power of The Convention and possibly much less (Article IX §1(a)). Further, the allegedly unlawful By-Law, Article XII §1(e), which precludes eligibility for nomination, election, or appointment to the Board of Directors for individuals age 66 and older, is subject to amendment only upon a two-thirds vote of the mem-

bers of The Convention present at any meeting of the same (Article IX §3(d)). Accordingly, it is not within the exclusive power of the members of the Board of Directors to eliminate the age requirement relating to election, nomination or appointment thereto.

It is incumbent upon this Court to initially address the issue of whether an elected director of a fraternal not-for-profit corporation is an employee within the purview of the ADEA. Surprisingly, this issue has apparently received no judicial attention in the reported federal forum. This Court is unaware, and the parties have failed to produce, direct judicial authority or legislative history in support of or in opposition to the proposition that an elected director* of a corporation is an "employee" within the protective purview of the ADEA. For the reasons which follow, this Court concludes that the liberal interpretation to be afforded the ADEA is not so expansive so as to encompass the elected positions which compose the subject of this litigation, and that this action must be dismissed for lack of subject matter jurisdiction.

Although, as established in *Moses v. Falstaff Brewing Corporation,* 525 F.2d 92 (8th Cir. 1975), the ADEA consists of remedial and humanitarian legislation and hence must be construed liberally to achieve its purpose of protecting older employees from discrimination, the federal forum must be hesitant in extending the coverage of this remedial legislation to individuals not within the intended congressional scope of protection. Unfortunately, neither the ADEA, its legislative history nor the regulations prom-

---

***Although members of the Association's Board of Directors are not technically "directors" within the corporate definition of that term since the members are elected by The Convention as heretofore discussed rather than directly by shareholders, the analogy is appropriate in that both positions entail an elected status to a position which is charged with the duty of managing the affairs of an association.**

ulgated thereunder directly addresses the issue of whether an elected director falls within the scope of the Act's protective measures. However, upon thoroughly reviewing these authorities in their totality, this Court concludes that extention of the ADEA to such an elected position would result in an improvident judicial expansion of the intended scope of protection of the ADEA.

It is initially noted that the definition of "employee" as "an individual employed by an employer" and the definition of "employer" as "a person engaged in an industry affecting commerce" provide no facial guidance. *See* 29 U.S.C. §§630(f) and 630(b), respectively. However, some guidance is provided by an examination of other pertinent provisions of the ADEA. The purpose of the ADEA as stated therein is:

> [T]o promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and *workers* find ways of meeting problems arising from the impact of age on employment (emphasis added).

29 U.S.C. §621(b). Further, Congress found and declared that:

> [I]n the face of rising productivity and affluence, older *workers* find themselves disadvantaged in their efforts to *retain employment,* and especially to *regain employment when displaced* from jobs (emphasis added).

29 U.S.C. §621(a)(1). This Court would judicially strain the clear congressional findings and purposes of the ADEA by holding that an elected executive position of a limited duration is held by a "worker" needing protection to "retain employment" or "regain employment" to such

elected position. A four year elected position is not possessed of the retention rights of non-elected positions sought to be protected by the ADEA.

The language of the pivotal prohibitive section of the ADEA, and upon which the action is predicated, also does not facially appear to apply to elected executive positions. §623 provides:

> (a) It shall be unlawful for an employer—
>
> (1) to fail or refuse to *hire* or to *discharge* any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or *privileges of employment,* because of such individual's age (emphasis added).

The obtention of a position through election does not constitute a "hiring" of an individual irrespective of the fact that such position may be accommodated by monetary compensation. Similarly the termination of an elected director's position in accordance with corporate By-Laws which provide for a limited tenure of office does not appear to constitute a "discharge" within the meaning of §623, nor does such constitute a violation of a "privilege" of employment. Fundamental cannons of statutory construction compel this Court to interpret the terms "hire" and "discharge" in accord with their ordinary, contemporary and common meaning unless otherwise defined. *Perrin v. U.S.*, 444 U.S. 37, 100 S.Ct. 311 (1979); *American Trucking Associations, Inc. v. U.S.*, 602 F.2d 444 (D.C. Cir. 1979), *cert. denied,* ..... U.S. ....., 100 S.Ct. 522 (1979); *Higgins v. Marshall,* 593 F.2d 1035 (D.C. Cir. 1978), *cert. denied,* 441 U.S. 931, 99 S.Ct. 2051, 60 L.Ed.2d 659 (1979); *Atchison, Topeka and Santa Fe Railway Co., et al. v. I.C.C.,* 607 F.2d 1199 (7th Cir. 1979), *cert. denied,* 446 U.S. 946 (1980); *Levings v. Califano,*

604 F.2d 591 (8th Cir. 1979); *Marshall v. Local Union 20, etc.*, 611 F.2d 645, 652 (6th Cir. 1979).

The prohibitions of §623(e) relating to "advertisement" are clearly inapplicable to an elected executive position. §624 directs the Secretary of Labor to study arrangements giving rise to "involuntary retirement", a situation again inapplicable to an elected position. In sum, the ADEA does not facially appear to have been drafted with a purpose other than that of protecting the "worker" and "employee" within the non-elective meanings of those terms.

Analogy between the ADEA and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-1 *et seq.*, is appropriate in view of the striking parallelisms between these two remedial statutes. As has been noted repeatedly:

> With a few minor exceptions the prohibitions of this enactment [ADEA] are in terms identical to those of Title VII of the Civil Rights Act of 1964 except that "age" has been substituted for "race, color, religion, sex, or national origin."

Hodgson v. First Federal Savings and Loan Association of Broward County, Florida, 455 F.2d 818, 820 (5th Cir. 1972). *Accord*: *Lorillard v. Pons*, 434 U.S. 575, 584, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978). The Sixth Circuit, citing *Hodgson*, noted that the "similarity . . . between Title VII and the Age Discrimination in Employment Act is hardly accidental." *Laugesen v. Anaconda Co.*, 510 F.2d 307, 311 (6th Cir. 1975). Although it was stated therein that "we do not here decide whether Congress intended that actions under the Age Act must invariably be guided by the Law applicable to Title VII cases" and that it "would be inappropriate simply to borrow and apply them automatically", such decision implicitly acknowledged that much of the law applicable to Title VII is appropriately applicable

to the ADEA. 510 F.2d at 312. In particular, this Court finds no reason to exclude the Title VII law relating to elected directors from application to the ADEA, particularly in view of the fact that both acts identically define "employee". Compare 29 U.S.C. §630(f) with 42 U.S.C. §2000e(f).

Perhaps the most pertinent decision to tangentally approach the issue sub judice is *Hishon v. King & Spalding,* 24 F.E.P. Cases 1303 (N.D. Ga. 1980), wherein the court dismissed for lack of subject matter jurisdiction an action predicated upon the sex discrimination provisions of Title VII by a female associate who was denied the status of partner in a defendant legal partnership. *Hishon* enunciated the important distinction between promotion and election for jurisdictional purposes:

> When a law firm associate becomes a partner he is not *promoted* to partnership, he is *elected* to partnership. The difference, this court thinks, should be obvious. A promising young lawyer who is elected to partnership is comparable to a promising young engineer working for the Chevrolet Division of General Motors who is elected to the board of directors of that corporation. This comparison, if apt, goes far toward resolving this case; this for the reason that the legislative history of Title VII clearly shows that the chapter was not intended to apply to the election of corporate directors (original emphasis).

24 F.E.P. Cases at 1306. The legislative history of Title VII referred to provides:

> Mr. Clark: Mr. President, during the course of this debate, a number of objections have been raised to various provisions of title VII. I believe, rather than to deal with them seriatim, and to an empty

> Chamber, it would be wiser to have them printed in the Record, where they can be perused at leisure by Senators—there may be one or two who still read this debate in the Congressional Record. Accordingly, I ask unanimous consent that a series of objections which have been raised by opponents of the bill, either on or off the floor, to title VII, and the answers to these objections may be printed in full in the Record at this point in my remarks.
>
> There being no objection, the statement was ordered to be printed in the Record, as follows:
>
> * * *
>
> Objection: It is arguable that the bill apply to the election of the Board of Directors by stockholders:
>
> Answer: It will not. Board members are not employees nor are stockholders employers.

110 Cong. Rec. 7217-8 (1964).

The position of an elected director of the Association is analogous to the position of an elected partner in a partnership as addressed in *Hishon*. Both are elected and not hired or promoted to their respective positions. The directors of the First Catholic Slovak Ladies Association manage and control its business:

> The Board of Directors shall meet at least twice a year for the purpose of managing the affairs of the Association in accordance with these By-Laws, shall have supervision over the acts of the Association between conventions, and shall establish the general policies that will govern the action of the Executive Committee in the interim between meetings of the Board.

By-Laws, Article X(b). As managers, the directors more closely perform the duties of employers rather than employees, and as such neither need nor are entitled to the protective provisions of the ADEA. *Cf: Burke v. Friedman,* 556 F.2d 867 (7th Cir. 1977) wherein partners of a partnership were classified as employers rather than employees for purposes of Title VII.

In sum, an examination of the ADEA, its legislative history and the regulations promulgated thereunder (which offered no guidance) reveals the impropriety of extending the protective provisions of that Act to the positions of the Board of Directors of the Association. On the contrary, the ADEA facially reveals the applicability of that Act to employees and workers who are hired, discharged or discriminated against as opposed to officers and directors who are elected. This Court's decision is supported by the legislative history and judicial interpretation of the parallel Title VII provisions.

Last, it is noted that the authority and arguments submitted by plaintiff EEOC are either irrelevant to or not inconsistent with this decision. In particular, *Hoy v. Progress Pattern Company,* 217 F.2d 701 (6th Cir. 1954) is afforded little authoritative weight for the propositions advanced by the plaintiff since such decision preceded the enactment of the ADEA by 13 years and has not appeared to have been cited with approval thereafter.

The record conclusively demonstrates that there exists no genuine issues relating to the material facts of whether the Board of Directors are elected and perform managerial duties. Further, the defendant Association is entitled to judgment as a matter of law. Accordingly, defendant's Motion for Summary Judgment is hereby granted pursuant to this Court's lack of subject matter jurisdiction over this

action as initiated under the Age Discrimination in Employment Act.

IT IS SO ORDERED.

/s/ ROBERT B. KRUPANSKY
United States District Judge

APPENDIX C

Judgment Entry of the Court of Appeals for the Sixth Circuit

(Filed December 10, 1982)

No. 81-3534

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,

VS.

THE FIRST CATHOLIC SLOVAK LADIES ASSOCIATION,
Defendant-Appellee.

Before: ENGEL and MERRITT, *Circuit Judges;* and MORTON, *Chief District Judge.*

JUDGMENT

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the case is remanded for further proceedings consistent with the opinion of this Court.

It is further ordered that Plaintiff-Appellant recover from Defendant-Appellee the costs on appeal, as itemized below, and that execution therefor issue out of said District Court, if necessary.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

APPENDIX D

Order of the Court of Appeals for the Sixth Circuit Denying Petition for Rehearing En Banc

(Filed February 23, 1983)

No. 81-3534

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,

v.

THE FIRST CATHOLIC SLOVAK LADIES ASSOCIATION,
Defendant-Appellee.

ORDER DENYING PETITION FOR REHEARING EN BANC

Before: ENGEL and MERRITT, *Circuit Judges*; MORTON, *Chief District Judge**

A majority of the court having not voted in favor of an en banc rehearing, the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

*The Honorable L. Clure Morton, Chief District Judge, United States District for the Middle District of Tennessee, sitting by designation.

APPENDIX E

29 U.S.C. § 621

§ 621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that—

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

* * * * *

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

* * * * *

29 U.S.C. § 631

§ 631. Age limits

(a) Individuals at least 40 but less than 70 years of age

The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age but less than 70 years of age.

* * * * *

Office - Supreme Court, U.S.
FILED
JUL 25 1983
ALEXANDER L. STEVAS
CLERK

No. 82-1897

In the Supreme Court of the United States

OCTOBER TERM, 1983

FIRST CATHOLIC SLOVAK LADIES ASSOCIATION,
PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether officers of a fraternal benefit association may be considered "employees" for purposes of the Age Discrimination in Employment Act.

2. Whether eligibility for election as an officer of a fraternal benefit association is an employment opportunity within the purview of the Age Discrimination in Employment Act.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1897

FIRST CATHOLIC SLOVAK LADIES ASSOCIATION,
PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is reported at 694 F.2d 1068. The opinion of the district court (Pet. App. A7-A18) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1982. A petition for rehearing was denied on February 23, 1983. The petition for a writ of certiorari was filed on May 20, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a nonprofit benevolent association which sells insurance to its members, maintains a nursing home, and supports educational and religious programs (Pet.

App. A2). The highest legislative powers of the Association are vested in the Convention, a group comprising a Board of Directors, members of a Court of Appeals, and delegates from the local Branches of the Association (*id.* at A8). From among the delegates, the Convention elects the officers of the Association for four year terms (C.A. App. 176).[1] The Convention also fixes the officers' salaries (*id.* at 177). The officers' duties are set out in the bylaws, which can be amended by the Convention (*id.* at 174). Officers who fail conscientiously to fulfill their duties are subject to dismissal (*id.* at 177).

Article X(a) of petitioner's bylaws states that the Association's officers shall also constitute the Board of Directors (Pet. App. A3; C.A. App. 174).[2] Although the officers are paid a salary for the work they perform as officers (C.A. App. 177), they are not compensated for the work they perform as directors (*id.* at 174-175).

Article XII, Section 1(e), of petitioner's bylaws sets out requirements for employment as an officer of the association. It includes a provision stating (Pet. App. A10; C.A. App. 176):

> Any delegate of the Association who is 66 years or under on the first day of the new term is eligible for nomination, election, or appointment to the Board of Directors.

Because officers must also serve on the Board of Directors, delegates who are over 66 years of age are thus ineligible to serve as officers.

---

[1] "C.A. App." refers to the joint appendix in the court of appeals.

[2] Article X(a) states:

> The members of the Board of Directors shall be the elected officers defined in Article XII, Officers, Section 1 in General, subparagraph (a).

2. From at least 1976 until January 29, 1980, Frances Mizenko and Anna Hook worked full-time as officers of the Association. Mizenko earned $25,000 per year as Secretary of the Association (C.A. App. 51, 56, 60, 64, 68). Her duties included managing the office, maintaining records, publishing monthly statements and the annual report, and receiving all money due the Association (*id.* at 179-180). Hook, who had been Secretary of the Junior Order since at least 1976, earned $15,000 per year (*id.* at 51, 56, 60, 64, 68). Her duties included receiving all money due the Junior Order, publishing monthly and annual reports, preparing financial statements, and keeping the records for all membership applications (*id.* at 181).

As officers of the corporation, Mizenko and Hook were also members of the Board of Directors, as required by Article X(a). When their four-year terms as officers expired, they were over 66 years of age. They were thus ineligible to be considered for reelection to the jobs they were then holding, due to the operation of Article XII, Section 1(e), which prohibits the election of delegates over the age of 66 to the Board of Directors (Pet. App. A5-A6). They were retired on January 29, 1980 (C.A. App. 68) and filed complaints of age discrimination with the Equal Employment Opportunity Commission.

3. The Commission then filed this action on their behalf, pursuant to Section 7(b) of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. 626(b), alleging that the Association's rule prohibiting delegates or incumbent officers over age 66 from serving on the Board of Directors violates Section 4(a) of the Act, 29 U.S.C. 623(a). (C.A. App. 4.)

The district court granted the Association's motion for summary judgment, holding that it lacked subject matter jurisdiction over the case because the ADEA does not cover

"officers and directors who are elected" (Pet. App. A17). The court held that Section 4(a)(1) of the Act—which makes it unlawful "to fail or refuse to hire or to discharge any individual * * * because of such individual's age"—does not apply where a worker obtains her position through an election, and then loses it "in accordance with corporate By-Laws" (Pet. App. A13).

4. The court of appeals reversed, holding that petitioner's officers were employees covered by the ADEA since they "performed traditional employee duties[,] * * * were responsible for their work to the governing body of the organization and * * * drew salaries as employees" (Pet. App. A5). The court held that "[t]heir participation on the policy-making Board of Directors does not detract from their primary role as employees" (*ibid.*). The court therefore concluded that the age limitation imposed on officers by petitioner's bylaws violates the ADEA.

ARGUMENT

1. Petitioner argues (Pet. 13-17) that the court of appeals erred in looking to the actual duties performed by petitioner's officers, rather than to various factors concerning their selection and tenure, in determining whether they were "employees" within the meaning of the ADEA. This argument is without merit. Although there is some variation among the courts of appeals regarding the details of the test to be used in determining employees' status under federal legislation such as the ADEA, all courts agree that the starting point is the actual working relationship between the parties. See, *e.g.*, *Cobb* v. *Sun Papers, Inc.*, 673 F.2d 337, 341-342 (11th Cir. 1982) (Title VII); *Spirides* v. *Reinhardt*, 613 F.2d 826, 831-833 (D.C. Cir. 1979) (Title VII); *Mednick* v. *Albert Enterprises, Inc.*, 508 F.2d 297, 302-303 (5th Cir. 1975) (Fair Labor Standards Act); *Hickey* v. *Arkla Industries, Inc.*, 699 F.2d 748, 751-753 (5th Cir. 1983) (ADEA).

The court of appeals correctly examined the entire relationship between the parties to determine whether petitioner's officers should be treated as employees under the ADEA. Only after scrutinizing the nature of the tasks performed by petitioner's officers, their relationship with petitioner's governing body, and how they were paid, did the court determine that they should be treated as "employees" for purposes of the Act (Pet. App. A5).

Petitioner nonetheless argues that its officers cannot be considered employees because they are chosen "through a democratic, electoral process" (Pet. 15). But the ADEA, though it expressly excludes employees "elected to public office in any State or political subdivision of any State" (29 U.S.C. 630(f)), does not otherwise distinguish among employees on the basis of the manner of their selection. Its application is not confined, as petitioner contends (Pet. 14-15), to those who are "hired" in the most typical fashion. Rather, Section 4(a) makes it unlawful

> (1) to fail or refuse to hire * * * *or otherwise discriminate* against any individual * * * because of such individual's age;
>
> (2) to limit, segregate, or classify * * * employees in any way which would deprive or tend *to deprive any individual of employment opportunities* * * * because of such individual's age * * *.

29 U.S.C. 623(a)(1) and (2) (emphasis added). Under the Act it makes no difference that the deprivation of employment opportunities is caused by one person or by a group.

Nor is it relevant, as petitioner suggests, that the Association's officers have "no expectation of a continuous tenure" (Pet. 15). An "employee" under the ADEA is "an individual employed by any employer" (29 U.S.C. 630(f)), and it is immaterial whether he holds his job at will, cf. *NLRB* v. *Waterman Steamship Co.*, 309 U.S. 206, 219 (1940), or for a

fixed period, *Levine* v. *Fairleigh Dickinson University*, 646 F.2d 825 (3d Cir. 1981).

Finally, it is not decisive that petitioner's officers are "managerial executives," not "clerical and maintenance personnel" (Pet. 13, 14). It is well settled that both groups are covered by the ADEA. See, *e.g.*, *Stanojev* v. *Ebasco Services, Inc.*, 643 F.2d 914, 916 (2d Cir. 1981) (vice president); *Simmons* v. *McGuffey Nursing Home, Inc.*, 619 F.2d 369 (5th Cir. 1980) (administrator of nursing home and nonvoting member of board of directors). Cf. *Novotny* v. *Great American Federal Savings & Loan Ass'n*, 584 F.2d 1235 (3d Cir. 1978), vacated on other grounds, 442 U.S. 366 (1979) (secretary of company and member of board of directors (Title VII)). See also 29 U.S.C. (Supp. V) 631(c)(1) (ADEA permits compulsory retirement of certain "[b]ona fide executives [and] high policymakers").

2. Petitioner also argues that the legislative history of Title VII, 42 U.S.C. (& Supp. V) 2000e *et seq.* — which this Court has said bears "important similarities" to the ADEA, *Lorillard* v. *Pons*, 434 U.S. 575, 584 (1978)—shows that corporate board members (and by analogy its own directors) are not to be considered "employees" (Pet. 10-13). But the court of appeals here held only that the ADEA prohibits petitioner from indirectly imposing an age limit on employment as an *officer* of the Association by tying eligibility to an age-restricted status—membership on the board of directors. Under the court's ruling, petitioner need not change its eligibility requirements for board membership in order to comply with the ADEA. If it wishes to retain the age limitation, it can cease using board membership as a qualification for employment as an officer. The court thus did not hold that members of petitioner's board of directors must be considered employees.

As we made clear above (page 5), the court of appeals correctly determined that, based on their actual working relationship with petitioner, its officers are employees for purposes of the ADEA. Petitioner's argument amounts to a contention that these employees lose the protection of the ADEA because the Association requires that they also serve on its board of directors. There is no support in the Act or the case law for this approach, which, if accepted, would create an unwarranted gap in the protection that Congress provided against age discrimination in employment. When a person performs separate work as an officer, and is compensated for that work, an employer cannot escape the obligations of its employment relationship by arguing that the officer is also a director, and so not an employee. Cf. *Bonilla* v. *Oakland Scavenger Co.*, 697 F.2d 1297, 1302 (9th Cir. 1982), petition for cert. pending, No. 82-1699 (company which ties employment to stock ownership cannot avoid Title VII by arguing that it does not apply to discrimination in the sale of stock).

Petitioner's reliance on *Hishon* v. *King & Spalding*, 678 F.2d 1022 (11th Cir. 1982), cert. granted, No. 82-940 (Jan. 24, 1983) is misplaced. In *Hishon* the Eleventh Circuit held that Title VII does not apply to discrimination in partnership decisions in law firms, because partners are not "employees" under that Act. That is so, the court held, because partners both own and control the business, and share in its profits and losses. It would thus be inappropriate to consider them employees of the partnership (678 F.2d at 1028). Petitioner's officers, by contrast, have no ownership interest in the Association, and do not share in any profits or losses. Nor do they control the Association, whose affairs are directed by the Convention. See page 2, *supra*. As the court of appeals here noted, "[t]he election to partnership

with its corresponding opportunity to share in the partnership profits differs markedly from the 'election' to the position of officer in the FCSLA" (Pet. App. A5).[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Equal Employment Opportunity Commission

JULY 1983

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[3]Petitioner lists as one Question Presented "[w]hether eligibility for election to a position of director/officer * * * constitutes an employment opportunity within the purview of the" ADEA (Pet. I). The only discussion related to that issue appears at Pet. 14-15, where petitioner notes that its "clerical and maintenance personnel" cannot "be said to regard a position as a director/officer as an employment opportunity to which [they] may someday be promoted." But it is irrelevant to the decision of this case that petitioner may have two separate tracks of employees, and that people may be disqualified from becoming officers for reasons other than age. If officers are themselves employees, then the position of officer is an "employment opportunit[y]" (29 U.S.C. 623(a)(2)) which was denied to Mizenko and Hook because of their age.